88-699

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
Petitioner,

v.

JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEAL

VICTOR J. VAN BOURG *
SANDRA RAE BENSON
VAN BOURG, WEINBERG, ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, California 94111
Telephone (415) 861-1000

LAURENCE E. GOLD
CONNERTON, RAY & SIMON
1920 L Street, N.W., 4th Floor
Washington, D.C. 20036
(202) 466-6790
Attorneys for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether an International Union may be held vicariously liable under Title VII, 42 U.S.C. § 2000e *et seq.*, for the acts of an affiliated autonomous Local Union where the International Union has adopted a nationwide affirmative action training program funded by and at the request of the United States Department of Labor, and where the Local Union's administration of the program results in a disparate impact even though the International Union had no notice of the alleged improper action of its autonomous affiliated Local Union and was given no opportunity to take remedial action.

2. Whether an International Union can be burdened with vicarious liability because it made lawful suggestions to an autonomous affiliated Local Union that the Local Union should take aggressive affirmative steps to bring into the work force and into the membership of the Union minorities, under circumstances which would require the International Union to impose a trusteeship on an autonomous Local Union in violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 401 *et seq.*, if those suggestions are not followed.

3. Where, pursuant to the policies of *United Mineworkers v. Gibbs*, 383 U.S. 715 (1969) and Title VII, 42 U.S.C. § 2000e *et seq.*, an International Union attempts to advise Local Unions how to comply with the requirements of Title VII, 42 U.S.C. § 2000e *et seq.*, may the International Union be held vicariously liable for a Local Union's failure to take sufficient action to remedy a situation causing a disparate impact.

LIST OF PARTIES TO THE PROCEEDINGS

The following persons or entities are the parties to the proceeding below and their party designation is listed.[1]

Jesse Berger (Plaintiff)

Randolph Jackson (Plaintiff)

Tommy Kirkland (Plaintiff)

Van Edward Louis (Plaintiff)

Ronald Tucker (Plaintiff)

Ernest Bellamy (Plaintiff)

Garrick Simmons (Plaintiff)

Willie Lee McMillan (Plaintiff)

Iron Workers Reinforced Rodmen, Local 201 (Defendant)

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Defendant)

Construction Contractors Council, AGC Labor Division, Inc. (Defendant)

Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 (Defendant)

Local Administrative Committee of the National Iron Workers and Employers Training Program (Defendant)

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[1] Petitioner believes that the Construction Contractors Council, AGC Labor Division, Inc., the Apprenticeship Committee for Iron Workers Reinforced Rodmen, Local 201 and the Local Administrative Committee of the National Iron Workers and Employers Training Program no longer have an interest in this litigation, since the D.C. Circuit reversed the District Court's findings of liability against these entities.

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JESSIE BERGER, RANDOLPH JACKSON, TOMMY KIRKLAND, VAN EDWARD LOUIS, RONALD TUCKER, ERNEST BELLAMY, GARRICK SIMMONS & WILLIE LEE MCMILLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEAL

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, respectfuliy prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 5, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit holding the International Union vicariously liable for the actions of its affiliated Local Union No. 201 is reported at 843 F.2d

1395 (D.C. Cir. 1988) and is printed at Appendix 1a in the Joint Appendix.[2] The Court of Appeals for the District of Columbia Circuit slip opinion dated July 29, 1988 is printed at Appendix 88a in the Joint Appendix. The Trial Findings of the United States District Court for the District of Columbia is unreported and is reprinted at Appendix 92a in the Joint Appendix. The District Court's amended order is unreported and is reprinted at Appendix 156a in the Joint Appendix. The Court of Appeals' April 5, 1988 judgment is reprinted at Appendix 174a in the Joint Appendix. The orders of the Court of Appeals dated July 29, 1988 regarding the petitions for rehearing and the suggestion for rehearing *en banc* are reprinted at Appendices 178a & 180a in the Joint Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 5, 1988. A petition for rehearing and suggestion for rehearing *en banc* was filed on May 11, 1988.

The Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc* on July 29, 1988. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely filed with this Court pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant federal statutes involved are 42 U.S.C. § 1981 and 42 U.S.C. §§ 2000e-2 and 2000e-5 which are reprinted in pertinent part at Appendix 1a to this Petition.

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[2] The Joint Appendix is submitted by the International Association, Petitioner herein, and by Reinforced Rodmen's Local Union 201 with respect to its separate Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves a class action brought by eight black construction workers alleging racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Petitioner, International Association of Bridge, Structural and Ornamental Ironworkers, is an International Union within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.* Rodmen's Union Local 201 is a Local Union in the Washington, D.C. area and is affiliated with the International Association.

The complaint charged that various requirements for admission into Local 201 discriminatorily denied black rodmen the benefits of union membership. Suit was filed in 1975, and the case was tried in 1981. Almost four years later, in 1985, the District Court issued its Trial Findings. The District Court adopted almost verbatim the proposed Findings of Fact and Conclusions of Law submitted by the plaintiffs, including typographical errors. As found by the Court of Appeals, the District Court failed to perform any independent reasoning, failed to address the defendants' leading arguments, and the Trial Findings contained a number of "clearly erroneous factual findings and several errors of law." In the words of the D.C. Circuit, "[n]ot surprisingly, the District Court found all of the defendants liable for all of the alleged violations of Title VII and Section 1981." (See *Berger*, 843 F.2d at 1404, 1407-08).

Specifically, the District Court found the International Association vicariously liable under Title VII and 42 U.S.C. § 1981 for the actions of Local 201 and, in addition, found the International liable for retaliation against Plaintiff Bellamy. On appeal, the latter finding was reversed by the D.C. Circuit; however, the D.C. Circuit affirmed the finding of vicarious liability for the actions of Local 201.

The case was tried solely on statistics on a disparate impact theory. There was no evidence of disparate treatment involved. The Court of Appeals found that the Local Union's requirement that persons complete a training program prior to being able to sit for the journeyman examination had a disparate impact upon blacks. The Court of Appeals succinctly stated, with emphasis, the conduct found to be violative of Title VII and § 1981:

> *An educational prerequisite—either apprenticeship or training—discriminatorily delayed Union membership for qualified black permit workers.* (emphasis in the original) (*Berger*, 843 F.2d at 1414)

With respect to the International Union, the Court of Appeals recognized that the International Constitution does not "require or authorize Locals to require, applicants for membership to complete a Union-supervised educational program." Rather, under the International Constitution one need only be "a practical workman versed in the duties of some branch of the trade . . . of good moral character and competent to demand standard wages." (*Berger*, 843 F.2d at 1431).

Additionally, there was no evidence that the International knew that a disparate impact was occurring at Local 201. In fact, the International had reason to believe that no discrimination was occurring in the Local Union by virtue of the Federal Government's exclusion of Local 201 from a federally-mandated affirmative action plan because, as the government found, Local 201 had a significant percentage of minority participation. Nevertheless, the Court "inferred" knowledge on the part of the International and, on that basis, imposed vicarious liability upon the International Union.

The International Union now seeks a Writ of Certiorari to review this imposition of vicarious liability.

REASONS WHY THE WRIT SHOULD ISSUE

1. This case presents a serious policy dilemma for International Unions throughout the United States relating to civil right's issues. In this case, the Court is faced with an International Union which took very seriously the moral and legal mandates of the civil right's statutes enacted in the 1960s, and took affirmative action to implement this legislation and facilitate the entry of minorities into the ranks of the Ironworkers' Unions throughout the United States. The Training Program challenged in this case was established by the International Union on a nation-wide basis *at the request of the Federal Government*, and was designed to assist blacks and other minorities to become proficient in the ironworkers' trade. The decision in this case, imposing vicarious liability upon the International Union for the acts of an affiliate in the administration of the program, sends a message to International Unions across the country not to become involved in affirmative actions plans, since to do so could result in their being held vicariously liable for the acts of their affiliated Local Unions, despite the fact that the International may have no knowledge that a problem exists. This decision therefore hinders rather than advances the purposes for which the civil rights legislation was enacted.

2. If there is one constant principle enunciated by this Court for more than half a century, it is that International Unions will not be held liable for the acts of an affiliate unless it can be shown that the International authorized, ratified or participated in the Local Union's actions or otherwise controls the Local Union. (*Coronado Coal Co. v. United Mineworkers*, 268 U.S. 295 (1925); *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1979)) By imposing vicarious liability upon the International Union, the Court's decision is directly contrary to the principles enunciated by this Court, and the lower federal courts, as to when an International Union will

be held vicariously liable for the actions of affiliated Local Unions.

3. Since all of the actions complained of on the part of the International were designed to bring the Ironworkers' Local Unions throughout the United States into compliance with the civil rights legislation, the holding below imposing vicarious liability upon the International Union is directly contrary to the principle enunciated by the Fifth Circuit in *Terrell v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981), where the Fifth Circuit noted that whether a party involved in an established Title VII violation may be excused from liability turns upon whether that party has proven that it has taken every reasonable step to bring employment practices into compliance with the law. Additionally, the decision conflicts with the Congressional policy of strengthening Local Union autonomy and self-government embodied in the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401 *et seq.*).

4. The Court's decision below conflicts with the national labor policy which encourages International Unions to use their mediating influences to bring Local Unions into compliance with law (*United Mineworkers v. Gibbs*, 383 U.S. 715 (1969)) and, instead, encourages International Unions not to become involved in Local Union problems for fear of incurring vicarious liability for the actions of the Local Union.

ARGUMENT

A. The Court's Decision Imposing Vicarious Liability Upon The International Union Conflicts With *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1971) And Its Progeny.

The opinion below cites no evidence that the International Union authorized, condoned or ratified the challenged conduct. Rather, the decision simply states that it is "reasonable to infer" an agency relationship and to "infer" International knowledge. As such, the imposition of vicarious liability upon the International Union is contrary to *Carbon Fuel Co. v. United Mineworkers*, 444 U.S. 212 (1971) and its progeny. A brief review of the facts is necessary to demonstrate the chilling effect which the decision below will have upon International Unions nation-wide.

With respect to the Apprenticeship Program, the International Union sent apprenticeship questionnaires and guidelines to all of the Local Unions in the United States affiliated with the International, including Local 201. These questionnaires and guidelines were recommendations as to what the Local Unions should do in order to be in compliance with Federal Regulation 29 CFR, Part 30. (Int'l. Ex. 6). The International Union did not approve standards of apprenticeship for Local 201 or for any other Local Union since the International does not have that authority. Rather, approval of the apprenticeship standards is within the authority of the Bureau of Apprenticeship and Training of the Department of Labor. (*Id.*).

The Training Program was instituted in 1972 and was established under a CETA contract with the Department of Labor to provide membership opportunities to minorities over age 30 who were no longer eligible for the Apprenticeship Program. (T.R. 1481). At the request of the Federal Government, a national corporation known as the

National Ironworkers and Employers Training Program (not the International Union) was formed. (Int'l. Ex. 6). The national corporation signed a contract with the Federal Government, and it was then a voluntary decision on the Local Union's part as to whether or not it wished to participate. (*Id.*; Pls. Ex. 105, pp. 11-13). If the Local Union decided to participate in the Training Program, the Local Union signed a contract with the national corporation and the national corporation put the program into effect. (Int'l. Ex. 6) The Local Committee, which consists of three labor representatives from the Local Union and three management representatives from local employers, selected a director, selected the instructors, and selected the trainees. (*Id.*). The national corporation, with federal funds obtained through the GSA, supplied the school space, the tools and equipment. (*Id*). Any complaints concerning the Training Program were directed to the national corporation, not to the International Union. (*Id.*). The program was funded by the Department of Labor, and was primarily oriented toward training members of minority groups. (Rodmen Ex. 29 (C), pp. 1-2; T.R. 1333, 1512, 1563, 2876).

The Department of Labor contract prescribed objectives and standards for operation of the program. (Rodmen Ex. A-E)). A representative of the Department of Labor participated as a non-voting member of the Local Administrative Committee, and attended committee meetings. (Rodmen Ex. 29(C), p. 4; Rodmen Ex. 34 (A-J); T.R. 1354). The Department of Labor's representative was charged with the responsibility of monitoring the Local Administrative Committee's performance. (Rodmen Ex. 29(C), p. 19). The local Department of Labor representative frequently observed classes as well as attending committee meetings and, in addition, the Department of Labor has sent in a team to monitor the program and to interview students. (T.R. 1347-48).

It was undisputed that the International Union had no appointing authority to either the Apprenticeship Committee or the Training Program Committee on the local level, and was not involved in any way in the day-to-day administration of either program. Nevertheless, the court found the International vicariously liable for the actions of the Local Union because the International, in 1971, required the Local Union to administer the journeyman exam to all persons with two years' experience. This period was referred to as the "open period." However, the evidence demonstrated that the majority of persons who took the exam during the "open period" failed the examination. Thus, a year later, in 1972, the Training Program was established *at the request of the Federal Government* and in conjunction with the U.S. Department of Labor to provide a remedial program through which blacks and other minorities could gain the training necessary to earn a living in the Ironworkers' trade.

By imposing vicarious liability upon the International Union because of its participation in the establishment of the Apprenticeship Program and the Training Program, both of which were completely lawful on their face, and without any evidence of the International's involvement in their implementation or administration on the local level, the court's decision is directly contrary to the principles enunciated by this Court, and the lower federal courts, as to when an International Union will be held vicariously liable for the actions of affiliated Local Unions. In *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217-18 (1979), this Court held that an International Union will be held liable for the actions of its affiliates *only* if it authorizes, ratifies or participates in particular Local Union acts or otherwise controls the Local. See also, *Coronado Coal Company v. United Mine Workers*, 268 U.S. 295, 304-305 (1925); *NLRB v. International Longshoremens' and Warehouse-*

men's Union Local 10, 283 F.2d 558 (9th Cir. 1960). It is firmly established law that when two legal entities are separate, independent and self-governing autonomous bodies, one may not be held responsible for the acts of the other. *Coronado Coal Company, supra*, 268 U.S. 295, 299 (1925); *United Mineworkers v. Coronado Coal Company*, 259 U.S. 344, 393 (1922).

In the context of Title VII, the law is the same. In *Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), the Fifth Circuit noted that an International Union, although its constitution gives it significant control over its affiliated Local Unions, is not automatically liable for the actions of its affiliates in violation of Title VII.

> As a general proposition, however, International labor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII and the Equal Pay Act. . . *But that duty is not absolute under all circumstances.* In a situation such as now before the Court, it is based on the relationship between the International and the local and the amount and type of involvement which the International has with the collective bargaining agreement. . . . *Sinyard*, 577 F.2d at 945 (emphasis added).

In *Sinyard*, the International Union was not found liable for the Title VII and Equal Pay Act violations committed by its affiliated Local Union, despite the constitutional provisions giving it the right to control and approve the collective bargaining process, because the International did not participate in the collective bargaining process nor sign the collective bargaining agreement.[3] See also, *Boss v. International Brotherhood of Boilermakers*, 567 F.Supp. 845 (N.D.N.Y.), *aff'd without opinion*, 742 F.2d 1446 (2nd Cir. 1983), *cert. den.*,

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[3] The constitutional provisions in *Sinyard* were virtually identical to the constitutional provisions in the instant case.

105 S. Ct. 89 (1984) (International Union not liable for the Local Union's discriminatory operation of the hiring hall, despite the fact that the International was the *sole signatory* to the collective bargaining agreement, because there was no evidence that the International ratified, authorized or condoned the activities of the Local Union.)

With respect to the very constitution at issue in this case, the courts have likewise recognized that the constitutional provisions alone are inadequate to impose liability upon the International Association of Iron Workers. One Appellate Court has specifically rejected the proposition that this International is liable for the actions of a Local Union, even in negotiating collective bargaining agreements. See, *Crouch v. Mo-Can Ironworkers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984). Recently, a District Court, after exhaustively reviewing the provisions of the constitution at issue in this case, also expressly rejected the proposition that the constitution makes the International Association of Ironworkers per se liable for the acts of its affiliates, even where *the International itself* is signatory to the collective bargaining agreement. (See, *Hamilton v. International Bridge, Structural and Ornamental Ironworkers*, 122 L.R.R.M. 3309 (W.D. Ky. 1986)).

There was simply no evidence whatsoever in this case which showed that the International Union authorized, condoned or ratified the challenged conduct of requiring minority workers to participate in either the Apprenticeship Program or the Training Program prior to being able to sit for the examination. In fact, the only concrete evidence with respect to this issue demonstrated that the International Constitution neither required nor authorized Local Unions to require such an educational prerequisite, and demonstrated that each program was a voluntary program undertaken by the Local Unions and administered solely on the Local Union level. The

Court's decision rests upon the tenuous basis that it was "reasonable to infer" an agency relationship between the International and Local 201 and "reasonable to infer" that the International knew of the discriminatory impact occurring in Local 201. As will be discussed *infra*, this is not a "reasonable" inference in view of the Federal Government's decision to *exclude* Local 201 from the "Washington Plan", a federally-mandated affirmative action plan to correct discrimination in the Washington, D.C. area. Certainly *Carbon Fuel* and its progeny demand more than was present in this case before vicarious liability may be imposed upon an International Union.

B. The Court's Decision Is In Conflict With The National Labor Policy Which Favors The Exercise By International Unions Of Their Mediating Influences.

A review of the remaining evidence as to the International Union's actions which formed the basis for holding it vicariously liable is an exercise in irony, since by each of its actions, the International was attempting to help facilitate compliance with the civil rights laws.

In approximately 1963, the General President of the International Union assigned a representative to coordinate matters relative to civil rights in an endeavor to assist all Local Unions to come into compliance and stay in compliance with federal civil rights regulations. (Int'l. Ex. 6). The International subscribed to BNA and to Fair Employment Practices Reports and to numerous other sources all relative to civil rights problems which were read and, if something reported affected the Local Unions, the information was communicated to the Local Unions. (*Id.*). International representatives met with Local Unions and suggested appropriate form letters and discussed at length the reasons why standard procedures for acceptance of non-members should be adopted as well as why non-members should be admitted. The International intervened to prevent future Title VII litigation. The International sent organizers to meetings all over the

country informing the Locals to give persons working on permits tests to become members of the Association, and appointed a committee to visit every outside Local Union in the United States to explain what was required by Title VII, and to make recommendations to Local Unions to bring them into compliance with Title VII.

What the Court was confronted with in this case was an International Union which, rather than turning a blind eye to discrimination problems, took an active part in attempting to eradicate racial discrimination within the ranks of the Ironworkers unions. Thus, the decision in this case conflicts with this Court's enunciation of the federal labor policy in *United Mine Workers v. Gibbs*, 383 U.S. 715, 738-39 (1969).

In *Gibbs*, this Court stated that the national labor policy encourages International Unions to conduct normal supervisory functions even in explosive situations. In order that parent organizations would not be "chilled" in exercising their restraining and mediating influences, this Court recognized that "it would be inconsistent with the fabric of national labor policy to infer ratification" of a Local Union's activities from the mediating efforts of its International. (*Id.* at 738). This Court further recognized that this beneficial and salutary International presence would be unlikely if the parent union were required to repudiate or disavow the acts of its locals.

The Sixth Circuit has also warned that the imposition of vicarious liability upon Unions could mean the end of the Labor Movement as we know it:

> Such vicarious liability is repugnant to due process of law. And this Circuit has repeatedly recognized that unions may only be held responsible for the authorized or ratified acts of its officers and agents. *North American Coal Corp. v. Local 2262, United Mine Workers*, 497 F.2d 459, 466-67 (6th Cir. 1974)

Indeed, the D.C. Circuit itself has noted that where an International Union exercises its supervisory powers "in

good faith and in the absence of fraud", it should not be held answerable in damages to a member who was wrongfully disciplined by a Local Union. *International Brotherhood of Electrical Workers v. N.L.R.B.*, 487 F.2d 1113, 1129 (D.C. Cir. 1972). In a recent case involving union discipline, the Second Circuit reaffirmed that an International Union's mere exercise of supervisory powers is insufficient to render the affiliated union an agent of the International and held that ratification would only occur "if [the International] affirmed the discipline imposed on plaintiffs *with full knowledge* that it was part of an overall scheme to suppress dissent in violation of the LMRDA." *Radonich v. House Wreckers Local 95 of Laborers International Union*, 817 F.2d 967, 973 (2nd Cir. 1987) (Emphasis added).

It is simply inconceivable that this International Union which engaged only in activities which were designed to *increase* minority participation in not only Local 201, but in all of its affiliated Local Unions across the country, could then be held vicariously liable because of those activities. See, *Harnischfeger v. Sheet Metal Workers*, 436 F.2d 351, 355-56 (6th Cir. 1970) (International not liable where advised of unlawful conduct and counseled against it); *Bearfoot v. Teamsters*, 424 F.2d 101 (10th Cir. 1970), *cert. den.*, 400 U.S. 950 (1970) (International not liable where it responded to local's request for advice).

If this decision is permitted to stand, International Unions' mediating influences not only in the Title VII context, but in the management-labor dispute context will be lost. International Unions which attempt to adjust problems will be doing so at their own peril. In many cases where the International's influence is most needed, the International will refrain from acting to avoid incurring vicarious liability. This is a problem which will affect not only this International Union but International

Unions nation-wide. Thus the decision simply cannot be reconciled with this Court's enunciation of the national labor policy in this area.

C. The Decision Conflicts With The Congressional Goal Of Maximizing Local Union Autonomy And Self-Government Embodied In The Labor-Management Reporting And Disclosure Act of 1959.

In 1959, Congress passed the Labor-Management Reporting & Disclosure Act (The Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.*, to maximize Local Union autonomy and self-government. The provisions of Title III of the Landrum-Griffin Act reflect the congressional recognition that a Local Union is an entity separate and apart from its parent International. Thus, 29 U.S.C. § 402(h) defines "trusteeship" as any "receivership, trusteeship, or other method of supervision or control whereby a labor organization *suspends the autonomy* otherwise available to a subordinate body under its constitution or bylaws." (emphasis added). In an effort to preserve maximum "local self-government," Congress severely limited the grounds upon which an international may rely in imposing trusteeships (See 29 U.S.C. § 462), and provided jurisdiction for federal court challenges to Internationally-imposed trusteeships. (See 29 U.S.C. 464)

In view of this Congressional policy, the question becomes what could the International have done under law to remedy the problem which the Court below determined existed in the Local Union? The only disciplinary action open to the International would have been to place Local 201 under trusteeship pursuant to the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §§ 402, 462, 464 and 481). However, it is clear that had the International done so, such a trusteeship would have been set aside by a federal court, since there were no objective facts upon which the International could have relied in placing the Local Union under trusteeship for engaging in race discrimination.

The Local Union would certainly have relied upon its exclusion from the "Washington Plan" as evidence that the Federal Government had already determined that minority participation in Local 201 was adequate and not discriminatory. The "Washington Plan" was issued by the Secretary of Labor under Executive Order 11246 to require increased minority hiring on federally-involved construction projects in the Washington, D.C. SMA. Local 201 was specifically exempted from coverage under the Washington Plan because the Secretary of Labor found that existing minority participation in Local 201 did not require remedial action. The Secretary expressly found that the reinforced iron workers and certain other trades "contain a significant proportion of minority workers." (41 C.F.R. § 60-5.11 (1975)).[4]

In view of the fact that all of the International's actions were designed to *increase* minority participation, and in the face of no viable disciplinary action which could have been taken under law, the decision is contrary to the principle enunciated by the Fifth Circuit in *Terrell v. U.S. Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). In *Terrell*, the court noted that whether a party involved in an established Title VII violation may be excused from liability turns upon whether that party has proven to the full satisfaction of the court that it has taken every reasonable step to bring employment practices into compliance with the law. Clearly, the International Union in this case has taken every reasonable

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[4] Based upon this Court's decision in *General Builders v. Pennsylvania*, 458 U.S. 375 (1982), the Court below relieved the Employer Council of liability for the discriminatory practices on the ground that there was no evidence that it had knowledge that the referral practices of Local 201 operated in a discriminatory manner, relying upon Local 201's exclusion from the "Washington Plan." (*Berger*, 843 F.2d at 1437). The International Union had just as much of a right as the Employer Council to rely upon Local 201's exclusion from the "Washington Plan" in believing that no racial discrimination was occurring in the Local Union.

step to bring the employment practices within its affiliated Local Unions into compliance with Title VII and should not now be penalized for taking those steps.

At issue herein is the continued vitality of the historic internal labor union structure which balances the needs of Local Unions for democratic self-government against the reviewing and supervisory role traditionally held by International Unions. The LMRDA recognized both concerns by allowing Local Unions to exercise maximum self-government while authorizing Internationals to remove Local autonomy where necessary to preserve the union as an institution. Congress has specifically considered the issue of International liability and concluded "that an affiliated Local Union is not an agent of its parent union by virtue of that relationship or the parent's reservation of control over the activities of the Local." *Sen Comm. on Labor and Public Welfare, Equal Treatment of Craft And Industrial Workers*, Sen. Rpt. No. 438, 94th Cong. 1st Sess. 25 (1975). The decision in this case simply cannot be reconciled with these long-standing principles of Union autonomy.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari in this case should be granted in view of the significant conflict between this decision and the national labor policy enunciated by this Court and Congress over many decades. In addition, there are numerous policy reasons why the decision in this case should not be permitted to stand.

If the International Union had done nothing in this case and had taken no affirmative steps to assist minorities in gaining access to the ranks of the ironworkers' trade, it would not have been held vicariously liable since it would have simply turned a blind eye to the problem, and left behind no "trail of evidence" of its involvement. The holding in this case will have the effect of discour-

aging other International Unions from taking affirmative steps to end racial discrimination or to assist minorities, since to do so may lead to the International being held vicariously liable for the actions of affiliated Local Unions in carrying out those affirmative action programs. This will turn back the hands of time in the area of International Unions looking for solutions to discrimination problems and will do a disservice to the goal of bringing minorities into the Labor Movement. Thus, the decision as it now stands hinders rather than advances the purposes for which Title VII was enacted.

Respectfully submitted,

VICTOR J. VAN BOURG *
SANDRA RAE BENSON
VAN BOURG, WEINBERG, ROGER
& ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, California 94111
Telephone (415) 864-4000

LAURENCE E. GOLD
CONNERTON, RAY & SIMON
1920 L Street, N.W., 4th Floor
Washington, D.C. 20036
(202) 466-6790
Attorneys for Petitioner

* Counsel of Record

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APPENDIX

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STATUTES

42 USC § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC § 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

(b) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(c) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(d) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

(e) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compen-

sation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 . . .

(f) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 USC § 2000e-5 . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, of the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title. -